No. 17-

IN THE SUPREME COURT OF THE UNITED STATES

RECORD AND BRIEFS

October Term, 2017

KEITH THARPE,

Petitioner,

-v-

ERIC SELLERS, WARDEN
Georgia Diagnostic Prison,

Respondent.

THIS IS A CAPITAL CASE

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

"In my experience, there are two types of black people: 1. Black folks and 2. Niggers . . . . Because I knew the victim and her husband's family and knew them all to be good black folks, I felt Tharpe, who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did. . . . After studying the Bible, I have wondered if black people even have souls." – Sworn testimony of Barney Gattie, a white juror who voted to impose Keith Tharpe's death sentence.

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QUESTIONS PRESENTED FOR REVIEW

THIS IS A CAPITAL CASE

Petitioner is scheduled to die on September 26, 2017, despite evidence that racism played in pivotal role in his death sentence. No court has addressed this claim on the merits, even though it was first raised in post-conviction proceedings almost twenty years ago.

A few years after trial, a juror who had voted to impose death told Petitioner's state habeas attorneys that he had favored the death penalty because Petitioner was a "nigger" who had killed someone the juror considered "'good' black folk," and that his Bible study had led him to "wonder[] if black people even have souls." The state habeas court ruled these statements and other proof evincing the juror's racist beliefs and their impact on Petitioner's sentence inadmissible under Georgia's evidence rule barring jurors from impeaching their verdict, and found Petitioner's juror-bias claim procedurally defaulted. In federal habeas corpus proceedings, the district court adopted the state courts' procedural default ruling, a finding left undisturbed on appeal.

Last term, this Court decided two cases bearing on Petitioner's claim. In *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017), the Court held that a state's no-impeachment rule may not bar consideration of evidence "that racial animus was a significant motivating factor in [a] juror's vote to convict." In *Buck v. Davis*, 137 S. Ct. 759, 778 (2017), the Court recognized that the possibility that someone "may have been sentenced to death because of his race" was an "extraordinary circumstance" warranting relief from judgment under Fed.R.Civ.Proc. 60(b)(6). Invoking *Pena-Rodriguez* and *Buck*, Petitioner moved under Rule 60(b) to reopen the judgment in his case.

The district court denied the motion. It held that *Pena-Rodriguez* was a new rule of criminal procedure that could not be applied retroactively under *Teague v. Lane*, 489 U.S. 288 (1989), and that, regardless, the state court's conclusion that Petitioner had not shown prejudice sufficient to overcome any procedural default satisfied the standard set forth in *Pena-Rodriguez*, even though the state court in Petitioner's case did not have the benefit of this Court's guidance in that case and had not actually considered any of the evidence showing the juror's racial bias.

A panel of the Eleventh Circuit denied a certificate of appealability, finding (1) that Petitioner had not shown that the district court abused its discretion in denying the Rule 60(b) motion because the court "applied the correct legal standard and based its decision on findings of fact not clearly erroneous"; (2) that, assuming *Pena-Rodriguez* applied retroactively, Petitioner had not "made a substantial showing of the denial of a constitutional right" because he "failed to demonstrate that [the juror's] behavior 'had a substantial and injurious effect or influence in determining the jury's verdict'" or that reasonable jurists would find the district court's ruling debatable; and (3) that "[i]f [Petitioner] is correct that *Pena-Rodriguez* applies retroactively in post-conviction proceedings and thus gives rise to a constitutional claim he could not have brought to the [state habeas court], he is now free to pursue the claim in state court." The federal courts' rulings give rise to the following important questions:

1. Could reasonable jurists disagree with the district court's rejection of Petitioner's Rule 60(b) motion and, accordingly, did the Eleventh Circuit err in denying a certificate of appealability?

2. Given Petitioner's credible evidence that a juror voted for the death penalty because he is a "nigger," did the Eleventh Circuit err in ruling that he failed to make "a substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2).

3. Did *Pena-Rodriguez* create a new constitutional claim and, if not, did the lower courts err in denying Petitioner's motion for relief from judgment under Rule 60(b)(6)?

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Petitioner, Keith Tharpe, respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the Eleventh Circuit Court of Appeals, entered in the above case on September 21, 2017. *See* Appendix A.

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals, entered September 21, 2017, denying Mr. Tharpe's Application for a Certificate of Appealability is not yet reported, but is attached hereto as Appendix A. The unpublished decision of the district court denying Mr. Tharpe's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6), dated September 5, 2017, is appended as Appendix B. The Eleventh Circuit's published decision

affirming the district court's denial of habeas relief is attached hereto as Appendix C. The district court's prior decision in *Tharpe v. Humphrey*, Case No. 5:10-CV-433 (M.D.Ga.), denying habeas relief, dated March 6, 2014, is attached hereto as Appendix D. The district court's order finding Mr. Tharpe's juror-bias claim procedurally defaulted is attached as Appendix E hereto. The underlying state habeas court order in *Tharpe v. Hall*, Butts Co. Superior Court Case No. 93-V-144, denying habeas relief is unreported and attached hereto as Appendix F. The Georgia Supreme Court's order denying discretionary review of the state habeas court's decision is unreported and attached hereto as Appendix G.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals denying Petitioner's application for a certificate of appealability was entered on September 21, 2017. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254, Petitioner asserting a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime...nor be deprived of life, liberty, or property without due process of law...." U.S. Const. amend. V.
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...." U.S. Const. amend. VI.
>
> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.
>
> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person

of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV §1.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253 provides in pertinent part:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Federal Rule of Civil Procedure 60 provides in pertinent part:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: ... (6) any other reason that justifies relief.

STATEMENT OF THE CASE

A. The Trial.

Petitioner, Keith Tharpe, is currently under sentence of death in Georgia following a jury trial conducted in Jones County, Georgia, about three months after his arrest, in early January 1991.[1] The entirety of the guilt and penalty phases took place January 8-10, 1991. During voir dire, Mr. Tharpe's counsel raised a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), based on the district attorney's use of peremptory strikes against five of eight qualified

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[1] Mr. Tharpe was tried for offenses stemming from the September 25, 1990, murder of his sister-in-law Jackie Freeman and sexual assault of his estranged wife Migrisus Tharpe, while under the influence of drugs. *Tharpe v. State*, 262 Ga. 110, 110-11 (1992).

black venire members available for challenge, as well as the prosecutor's notorious history of race discrimination.[2] Dkt. No. 11-11 at 130-31. The trial court accepted the district attorney's race-neutral responses and the trial proceeded. Dkt. No. 11-11 at 145.

Prior to the *Batson* challenge, prospective juror Barney Gattie was questioned by the State and defense. Dkt. No. 11-3 at 85-99. Mr. Gattie testified that he had no preconceived notions about the case, that he did not know the victims, and that his only connection to any party was that Mr. Briley sometimes bought oysters at his seafood shop. Dkt. No. 11-3 at 95. Mr. Gattie was ultimately selected to serve on the jury. Dkt. No. 11-11 at 118-19. After convicting Mr. Tharpe, the jury heard evidence in aggravation and mitigation to inform their decision whether to sentence Mr. Tharpe to death or a parole-eligible life sentence. In aggravation, the State presented evidence that Mr. Tharpe had been convicted as a habitual traffic offender.[3] In mitigation, his attorneys presented brief testimony from a number of family members, including his wife Migrisus. The jury ultimately sentenced Mr. Tharpe to death. His convictions and sentence were affirmed by the Georgia Supreme Court on March 17, 1992. *Tharpe v. State*, 262 Ga. 110 (1992), cert. denied, *Tharpe v. Georgia*, 506 U.S. 942 (1992).

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[2] By the time of Mr. Tharpe's trial, Ocmulgee Circuit District Attorney Joseph Briley had already been found to have used peremptory strikes in a discriminatory manner under the stringent standard of *Swain v. Alabama*, 380 U.S. 202 (1965), which imposed a higher burden than *Batson*, specifically requiring a showing of the prosecuting attorney's history of discriminatory tactics. *See* Dkt. No. 12-6 at 57-61 (Brief of Appellant, *Tharpe v. State*); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991). Mr. Briley's history of discrimination included authoring a memo providing instruction to other attorneys about how to underrepresent African Americans and women on grand and traverse jury lists while still avoiding legal challenges. *See Amadeo v. Zant*, 486 U.S. 214, 217-18 (1988).

[3] *See Tharpe v. Head*, 272 Ga. 596 (2000).

B. State Habeas Proceedings

Mr. Tharpe filed his state habeas corpus petition on March 17, 1993; it was subsequently amended on December 31, 1997, and January 22, 1998. In May of 1998, Mr. Tharpe's state habeas counsel from the Georgia Resource Center conducted juror interviews. On May 16, 1998, attorneys Diana Holt and Laura-Hill Patton interviewed juror Barney Gattie at his home in Gray, Georgia. The visit lasted approximately one hour. Dkt. No. 15-16 at 23; Dkt. No. 77-6 at ¶ 2 (Affidavit of Laura Hill-Patton). Ms. Patton testified to her recollection of the interview:

> Mr. Gattie expressed his feelings about the case in general. He stated that there are two kinds of black people in the world – "regular black folks" and "niggers." Mr. Gattie noted that he understood that some people do not like the word "nigger" but that is just what they are, and he "tells it like he sees it." According to Mr. Gattie, if the victim in Mr. Tharpe's case had just been one of the niggers, he would not have cared about her death. But as it was, the victim was a woman from what Mr. Gattie considered to be one of the "good black families" in Gray. He explained that her husband was an EMT. Mr. Gattie stated that that sort of thing really made a difference to him when he was deciding whether to vote for a death sentence.

Id. This was consistent with attorney Diana Holt's recollection of the interview. Dkt. No. 15-16 at 19; Dkt. No. 77-7 at ¶ 7 (Affidavit of Diana Holt). Ms. Holt further recalled: "Mr. Gattie said that he was congratulated for a good job as a juror on this case by some folks in the community. He said that one of the victim's family members had even told him, 'Thanks for sending that nigger to the chair.'" Dkt. No. 15-16 at 20; Dkt. No. 77-7 at ¶ 11. The interview ended cordially with Mr. Gattie's wife offering the attorneys fried green tomatoes and inviting them to stay for dinner.[4] Dkt. No. 15-16 at 20-21; Dkt. No. 77-7 at ¶ 13.

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[4] Both Ms. Holt and Ms. Patton are white women, as is Laura Berg, another lawyer from the Georgia Resource Center, who accompanied Ms. Holt on a later visit with Mr. Gattie.

On May 25, 1998, Ms. Holt returned to Mr. Gattie's house with another Resource Center attorney, Laura Berg, as well as a draft affidavit based on Mr. Gattie's statements during the initial interview. Mr. Gattie asked the attorneys about other jurors they had sought to interview. When Ms. Holt mentioned they were having difficulty finding one juror, Tracy Simmons, who had moved out of state, Mr. Gattie stated: "you mean the nigger who used to live over by Juliette, Georgia. Yeah, I know who you are talking about, that nigger worked at the Bibb Company Plant in Forsyth until it closed."[5] Dkt. No. 15-16 at 21; Dkt. No. 77-7 at ¶ 14. Ms. Holt proceeded to ask Mr. Gattie to review the draft affidavit.

> I asked Mr. Gattie if I could read his statement to him, explaining that it was my practice to read witnesses their statements, and he agreed. He asked what I was going to do with it, and I told him I wouldn't do anything with it unless he approved it and confirmed the accuracy of it. He said, "well, go ahead. Let's here [sic] what you got there." I read the statement from beginning to end to him, including the preface declaring that Mr. Gattie was swearing to the following information. After each point, I looked at him and asked him if the statement was right. He nodded or said, "yes" after each point, except for one point related to the origin of integration. I corrected the statement on that point to reflect Mr. Gattie's actual words. He confirmed the accuracy of every word of the rest of the statement. He did not request any further changes to his statement. At the conclusion of my reading of Mr. Gattie's statement to him, I asked him if it was entirely accurate. He said it was. I also asked him if there were any changes he wanted to make to the statement. He said that there were not... I handed the statement to Mr. Gattie and asked if he wanted to read it. He said he didn't have his glasses and what I read was what he had said. After Ms. Berg swore Mr. Gattie, he signed the statement in Ms. Berg's presence, and she notarized it on the spot.

Dkt. No. 15-16 at 21; Dkt. No. 77-7 at ¶ 15.[6] Ms. Holt's recollection corroborates Mr. Gattie's affidavit, sworn to and signed that day, which included his amendment striking the term

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[5] Tracy Simmons was one of the two African Americans who served on Mr. Tharpe's jury. *See* Dkt. No. 15-8 at 7.

[6] Ms. Berg's recollection is consistent with Ms. Holt's. *See* Dkt. No. 15-16 at 1-11; Dkt. No. 77-8 at ¶ 3 (Affidavit of Laura M. Berg).

"interracial marriages" and replacing it with the handwritten word "integration," which he initialed. Dkt. No. 15-8 at 130; Dkt. No. 77-2 at ¶ 3 (Affidavit of Barney Gattie). The affidavit further summarized his racial views as he had described them to Ms. Holt and Ms. Hill-Patton during their initial interview:

> 3. I also knew the girl who was killed, Mrs. Freeman. Her husband and his family have lived in Jones county a long time. The Freemans are what I would call a nice Black family. In my experience I have observed that there are two types of black people: 1. Black folks and 2. Niggers. For example, some of them who hang around our little store act up and carry on. I tell them, "nigger, you better straighten up or get out of here fast." My wife tells me I am going to be shot by one of them one day if I don't quit saying that. I am an upfront, plainspoken man, though. Like I said, the Freemans were nice black folks. If they had been the type Tharpe is, then picking between life or death for Tharpe wouldn't have mattered so much. My feeling is, what would be the difference? As it was, because I knew the victim and her husband's family and knew them all to be good black folks, I felt Tharpe, who wasn't in the "good" black folks category in my book, should get the electric chair for what he did. Some of the jurors voted for death because they felt that Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason. The others wanted blacks to know they weren't going to get away with killing each other. After studying the Bible, I have wondered if black people even have souls. Interracial ~~marriages~~ started in Genesis. I think they are wrong. For example, look at O.J Simpson. That white woman wouldn't have been killed if she hadn't have married that black man.

Id.[7] The following day, on May 26, 1998, state habeas counsel filed Mr. Gattie's affidavit and faxed a copy to opposing counsel. Dkt. No. 77-9 (Petitioner's Notice to Rely on Affidavits, May 26, 1998). The very next day, Mr. Gattie signed a second affidavit, this time on behalf of the Respondent. It characterized his interaction with Mr. Tharpe's attorneys in a manner at odds with counsel's recollections of what occurred, suggesting that Mr. Gattie had not understood the purpose of their visit and had been intoxicated at the time he signed his prior affidavit. Dkt. No. 15-17 at 13-15; Dkt. No. 77-3 at ¶ 1; 3 (Affidavit of Barney Gattie dated May 27, 1998). While he testified that the word "nigger" was not used during deliberations and that, at the time he served on Mr. Tharpe's jury, he had not known Mr. Tharpe was on probation at the time of the

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[7] Despite maintaining that he did not read the affidavit before signing it, Mr. Gattie admitted during his deposition testimony that he made and initialed the correction shown in this image. Dkt. No. 15-6, at 44-45; Dkt. No. 77-4 at 44-45.

crime and did not discuss an alleged prior shooting with other jurors, Mr. Gattie did not deny using the term "nigger" generally, nor did he disavow his belief that black people could be divided into two categories of "good black folks" and "niggers." *See id.* In addition to filing Mr. Gattie's counter-affidavit, Respondent also moved to exclude Mr. Tharpe's juror affidavits in their entirety as improper impeachment of the jury's verdict inadmissible under O.C.G.A. §§ 17-9-41 and 9-10-9. *See* Dkt. No. 13-17 at 4. Although the affidavits were admitted into the record at the May 28, 1998, evidentiary hearing, the state habeas court later held that they, along with other testimony, were inadmissible under Georgia's no-impeachment rule. *See* Dkt. No. 19-10 (Appendix F) at 99-101.

In the months that followed, counsel for Mr. Tharpe sought to depose all the jurors to determine the extent to which racial bias had infected his trial. Dkt. No. *** (Petitioner's Notice of Depositions, June 1, 1998). In turn, Respondent sought a protective order to prevent depositions. Dkt. No. 14-8 (June 2, 1998). Although the state habeas court initially granted the protective order (Dkt. No. 14-10), after a motions hearing on August 24, 1998, it agreed to allow the depositions in the court's presence so that it could rule on what questions about the jurors' racial views would be permitted. *See* Dkt. No. 15-2 at 1-2.

The depositions were conducted on October 1-2, 1998. *See* Dkt. Nos. 15-6 – 15-8. Eleven of the twelve jurors testified, and all denied that any racial bias was involved in the deliberations. As for Mr. Gattie, he again specifically denied only one statement contained in his initial affidavit – namely that he had disclosed to other jurors that Mr. Tharpe was on probation for a prior shooting. Dkt. No. 15-6 at 54-55; Dt. 77-4 at 54-55. Although he maintained that Mr. Tharpe's counsel did not properly identify themselves and that he was intoxicated at the time he signed his first affidavit, Mr. Gattie did not deny the accuracy of any other statements in his

initial affidavit and, indeed, testified that the only inaccurate statement in it concerned jury-room discussions of the alleged prior shooting.[8] Dkt. No.15-6 at 118-19; Dkt. No. 77-4 at 118-19.

At a subsequent evidentiary hearing held on December 11, 1998, Mr. Tharpe submitted affidavits from the attorneys who had interviewed Mr. Gattie initially (Laura-Hill Patton and Diana Holt) and who were present when his affidavit was executed (Diana Holt and Laura Berg). *See* Dkt. No. 15-16 at 10-13, 17-26; Dkt. Nos. 77-6, 77-7, and 77-8. These affidavits, which were admitted into evidence, reaffirmed Mr. Gattie's racial attitudes and contradicted his testimony regarding the circumstances under which the affidavit was obtained. The attorneys also testified that they had introduced themselves to Mr. Gattie as attorneys who were working on Mr. Tharpe's behalf. Dkt. No. 15-16 at 23; Dtk. No. 77-6 at ¶ 3 (Affidavit of Laura-Hill Patton); Dkt. No. 15-16 at 17-18; Dkt. No. 77-7 at ¶ 4 (Affidavit of Diana Holt). Contrary to Mr. Gattie's suggestion in his second affidavit and his deposition testimony that he was significantly intoxicated at the time he signed his first affidavit, "Mr. Gattie did not appear to be tired or alcohol-impaired at any time throughout our visit. He was alert and animated as Ms. Holt read him the affidavit and afterwards, as we chatted with him." Dkt. No. 15-16 at 12; Dkt. No. 77-8 at ¶ 8 (Affidavit of Laura M. Berg); *see also* Dkt. No. 15-16 at 211 Dkt. No. 77-7 at ¶ 15 (Affidavit of Diana Holt). The attorneys further testified that Mr. Gattie was well aware of the contents of the affidavit, which he had corrected and signed on May 25, 1998.

> Ms. Holt read the entire affidavit to Mr. Gattie in a clear, slow voice, stopping every couple of lines to ask Mr. Gattie to verify that what she had read was accurate. Every time Ms. Holt would stop for verification Mr. Gattie would tell her "that's right" or "I'm sticking to my story" or would reiterate the statement that Ms. Holt had just read.

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[8] Mr. Gattie nonetheless testified that some of the statements in the affidavits were "out of proportion." Dkt. No. 15-8 at 82; Dkt. No. 77-5 at 14.

Dkt. No. 15-16 at 10; Dkt. No. 77-8 at ¶ 3 (Affidavit of Laura M. Berg); *see also* Dkt. No. 15-16 at 21; Dkt. No. 77-7 at ¶ 15.

After these proceedings, Mr. Tharpe's state habeas case languished and several changes in attorneys on both sides occurred. On July 30, 2007, the court conducted an evidentiary hearing addressing Mr. Tharpe's intellectual disability claim pursuant to *Turpin v. Hill*, 269 Ga. 302 (1998). After submission of post-hearing briefing and proposed orders, the state habeas court issued a final order denying relief on all claims. Dkt. No. 19-10 (Appendix F) (Final Order). With regard to the juror-bias claim, the state court ruled that all juror testimony in both affidavits and depositions was inadmissible under Georgia law: "[T]he fact that some jurors exhibited certain prejudices, biases, misunderstandings as to the law, or other characteristics that are not conducive to neutral and competent fact-finding is not a basis for impeaching the jury's verdict." Dkt. No. 19-10 (Appendix F) at 99. The court explained:

> The Georgia Supreme Court has made clear that the affidavits, such as those submitted by Petitioner to this Court, are not admissible. In *Spencer v. State*, 260 Ga. 640 (1990), the Georgia Supreme Court held: "The general rule is that affidavits of jurors may be taken to sustain but not to impeach their verdict." O.C.G.A § 17-9-41. **Exceptions are made to the rule in cases where extrajudicial and prejudicial information has been brought to the jury's attention improperly, or where non-jurors have interfered with the jury's deliberations.** *See, e.g., Hall v. State*, 259 Ga. 412 (383 S.E. 2d 128) (1989) and cases cited therein. Compare FRE 606 (b). (Footnote omitted.) The affidavit here does not fit within these exceptions to the rule. Compare *Shillcutt v. Gagnon*, 827 F2d 1155 (II) (7th Cir. 1987). *See also Wright & Gold, Federal Practice and Procedure*, Ch. 7, § 6074 at pp. 431-32. ("Most authorities agree that **the rule precludes a juror from testifying that issues in the case were prejudged,** a juror was motivated by irrelevant or improper personal considerations, **or racial or ethnic prejudice** played a role in jury deliberations." (Footnotes omitted.)) . . . *Spencer*, 260 Ga. at 643.

Id. at 99-100 (emphasis in original). Based on this analysis, the court concluded: "[A]s the juror depositions and Petitioner's affidavits with regard to these claims are inadmissible, Petitioner has failed to prove, with any competent evidence, that there was any juror misconduct...." *Id.* at

101. The state habeas court further ruled that, regardless, the juror misconduct claims, including the claim that Juror Gattie's racial prejudice invalidated the death sentence, were defaulted for failure to raise them on direct appeal, and that Mr. Tharpe had not shown cause and prejudice to overcome the default. *Id.* at 102-04. The court specifically observed that Mr. Tharpe had suffered no prejudice as he "has failed to show that any alleged racial bias of Mr. Gattie's was the basis for sentencing the Petitioner, as required by the ruling in *McCleskey.*" Dkt. No. 19-10 (Appendix F) at 102 (citing *McCleskey v. Kemp*, 481 U.S. 279 (1987)). Based on these rulings, the court made no fact or credibility findings regarding the disputed facts in Mr. Gattie's and the attorneys' testimony.

C. Federal Habeas Proceedings

Mr. Tharpe filed his federal habeas petition on November 8, 2010, in which he raised a juror misconduct claim based, *inter alia*, on racial bias. Dkt. No. 1 at 16-17. He reasserted the claim in his amended petition. Dkt. No. 25 at 16-17. By Order dated August 18, 2011, the district court found the claim procedurally defaulted based on the state habeas court's analysis of the default in its Final Order. Dkt. No. 37 at 8-9 (Appendix E). Mr. Tharpe continued to pursue his other claims for relief that were not procedurally barred. The district court denied his petition on March 6, 2014, but issued a certificate of appealability ("COA") to address the claim that trial counsel provided ineffective representation in investigating and presenting mitigation evidence. Dkt. No. 65 (Appendix D). The Eleventh Circuit expanded the COA to include the question of Mr. Tharpe's intellectual disability. *Tharpe v. Warden*, Eleventh Circuit Case No. 14-12464, Order of July 30, 2014. The Eleventh Circuit affirmed this Court's denial of habeas relief on August 25, 2016. *Tharpe v. Warden*, 834 F.3d 1323 (11th Cir. 2016) (Appendix C).

On April 14, 2017, Mr. Tharpe filed a petition for writ of certiorari based on issues addressed in the Eleventh Circuit's opinion. That petition was denied on June 26, 2017. *Tharpe v. Warden*, 137 S. Ct. 2298 (2017).

While counsel were preparing to file Mr. Tharpe's petition for a writ of certiorari, this Court issued decisions in *Buck v. Davis*, 137 S. Ct. 759 (2017), and *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). Based on these two decisions and while the certiorari petition remained pending before this Court, Mr. Tharpe, on June 21, 2017, filed a Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b) (6). Dkt. No. 77. Respondent, after receiving a requested extension of three weeks in which to respond, filed a response in opposition, Dkt. No. 89, and Mr. Tharpe filed a reply brief in support of his motion, Dkt. No. 93. On September 5, 2017, the district court denied relief, concluding that Mr. Tharpe's claim was barred by *Teague v. Lane*, 489 U.S. 288 (1989), and alternatively was procedurally defaulted. Dkt. No. 95 (Appendix B). The court denied a certificate of appealability. *Id.* at 22-23.

The next day, the State of Georgia obtained a warrant for Mr. Tharpe's execution permitting Mr. Tharpe's execution between Tuesday, September 26, 2017, and Tuesday, October 3, 2017.

On September 8, 2017, Mr. Tharpe filed an Application for Certificate of Appealability ("COA") and a separate Motion for Stay of Execution was filed on September 13, 2017. On September 21, 2017, a panel of the Eleventh Circuit denied the COA application and stay motion. *See* Appendix A. The panel ruled that the district court had not abused its discretion in denying the 60(b) motion because it "applied the correct legal standard and based its decision on findings of fact not clearly erroneous. Appendix A at 7. It further held that a COA should not issue to review the ruling because Mr. Tharpe had not "made a substantial showing of the denial

of a constitutional right" because, "[a]s the Butts County Superior Court and the District Court found, Tharpe failed to demonstrate that Barney Gattie's behavior 'had substantial and injurious effect or influence in determining the jury's verdict'" or that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal citation omitted) and *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Finally, the panel opined that "[i]f Tharpe is correct that *Pena-Rodriguez* applies retroactively in post-conviction proceedings and thus gives rise to a constitutional claim he could not have brought to the Butts County Superior Court, he is now free to pursue the claim in state court." *Id.* at 7-8. Judge Wilson concurred in the COA denial, noting that he would have granted COA in the case had he not concluded that the *Pena-Rodriguez* claim was not properly exhausted and accordingly that a stay should be granted and "the denial should be without prejudice so as to allow Tharpe a chance to re-file after it is properly litigated in Georgia state court." *Id.* at 9.[9]

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Mr. Tharpe's claim that one of his jurors was motivated to vote in favor of the death penalty on the basis of racial bias was raised in his First Amended Petition for Writ of Habeas Corpus filed in the Superior Court of Butts County, Georgia. *See* Dkt. No. 13-8 at 16. The state habeas court held that the evidence submitted in support of the claim was inadmissible under Georgia's law precluding jurors from impeaching their verdict and was otherwise procedurally defaulted. Dkt. No. 19-10 at 98-104. In federal habeas corpus proceedings, the district court

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[9] Although Mr. Tharpe argues below that his juror-bias claim was exhausted and the appropriate subject of a motion for relief from judgment under Rule 60(b)(6), he has also raised the claim anew, on the basis of the change in the law occasioned by *Pena-Rodriguez*, in a successive petition filed in state court on September 22, 2017.

found the claim procedurally defaulted as well. Dkt. No. 37 (Appendix E) at 8-10. Following this Court's rulings in *Pena-Rodriguez* and *Buck*, Mr. Tharpe moved to reopen this claim pursuant to Fed.R.Civ.Proc. 60(b)(6) on the basis of the new decisional law rendering his previously defaulted juror-bias claim cognizable, but the district court denied the motion and the Eleventh Circuit denied a certificate of appealability.

REASONS WHY THE PETITION SHOULD BE GRANTED

This Court has reaffirmed time and again that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.'" *Buck*, 137 S. Ct. at 778 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). Its cases reflect the Court's commitment to eradicating racial discrimination in the justice system. *See, e.g.*, *Pena-Rodriguez*, 137 S. Ct. at 867-68 (discussing cases). That commitment rings hollow if the State of Georgia is permitted to kill Mr. Tharpe without *any* judicial scrutiny of his long-standing and long-ignored claim that Juror Barney Gattie voted to impose the death penalty because Mr. Tharpe is black. That claim – supported by credible evidence, in the form of both sworn affidavits and live testimony, including Mr. Gattie's sworn statement that he voted for the death penalty because Mr. Tharpe is a "nigger" who killed a "'good' black" person and his flagrant, repeated and unabashed use of the word "nigger," a term that "is a universally recognized opprobrium, stigmatizing African-Americans because of their race"[10] – must not be swept under the rug any longer. This Court's intervention is necessary to prevent a grotesque and shocking perversion of justice.

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[10] *Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993).

ARGUMENT

I. The Eleventh Circuit's Denial Of COA Was In Flagrant Disregard Of This Court's Instruction That A Court Of Appeals Should Limit Its Examination At The COA Stage To A Threshold Inquiry Into the Underlying Merit Of The Claim And Ask Only If The District Court's Decision Was Debatable.

28 U.S.C. § 2253(c) requires a certificate of appealability to be granted before a habeas petitioner may appeal from a final district court judgment denying relief.[11] A COA should issue where the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). When, as here, a COA seeks to address a district court's procedural ruling, the petitioner must show "that [the] procedural ruling barring relief is itself debatable among jurists of reason . . . ." *Buck*, 137 S. Ct. at 777. *See Slack, supra.* As this Court recently explained in *Buck*, the COA inquiry "is not coextensive with a merits analysis" and, "[a]t the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). Here, Mr. Tharpe clearly met that standard in showing that reasonable jurists could disagree with the district court's denial of his Rule 60(b) motion on the ground that *Pena-Rodriguez* did not apply and that, regardless, the

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[11] The Eleventh Circuit requires issuance of a COA "before a habeas petition may appeal the denial of a Rule 60(b) motion." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1265 (11th Cir. 2015). *See also Buck*, 137 S. Ct. at 780 (Fifth Circuit erred in denying a COA to address procedurally defaulted claim of racial bias in capital sentence raised in Rule 60(b) motion).

state habeas court's failure to consider the evidence presented of Juror Gattie's racist views and their impact on the death sentence, nonetheless complied with *Pena-Rodriguez*.

A. Mr. Tharpe Appropriately Sought to Reopen the Judgment Under Rule 60(b)(6).

On the basis of this Court's recent decisions in *Pena-Rodriguez* and *Buck*, Mr. Tharpe moved to reopen the district court judgment in his case under Fed.R.Civ.Proc. 60(b)(6). That rule "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances, including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Rule 60(b)(6) "permits reopening when the movant shows 'any . . . reason justifying relief from the operation of the judgment' other than the more specific circumstances set out in Rules 60(b)(1)-(5)."[12] *Id.*[13] While the Antiterrorism and Effective Death Penalty Act of 1996 has placed limits on Rule 60(b)'s application in federal habeas proceedings, it appropriately applies to cases like Mr. Tharpe's, which "attack[], not the substance of the federal court's resolution of a claim on the merits, but some defect in the

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[12] Grounds 1-5 permit judgment to be opened due to

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or misconduct by an opposing party; (4) the judgment is void; [and] (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable . . . .

Fed.R.Civ.Proc. 60(b).

[13] "This clause is a broadly drafted umbrella provision which has been described as 'a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses.'" *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984) (quoting 7 J. Lucas & J. Moore, Moore's Federal Practice para. 60.27[2] at 375 (2d ed. 1982)).

integrity of the federal habeas proceedings," *id.* at 532, in this case the preclusion of proof to support Mr. Tharpe's juror misconduct claim and the court's application of an overly burdensome prejudice standard to find the claim procedurally defaulted.

"Rule 60(b) vests wide discretion in the courts, but . . . relief under 60(b)(6) is available only in 'extraordinary circumstances.'" *Buck*, 137 S. Ct. at 777 (quoting *Gonzalez*, 545 U.S. at 535). Such circumstances must be determined on the basis of "a wide range of factors [that] may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Buck*, 137 S. Ct. at 778 (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-64 (1988)).

In *Buck*, the Court held that the district court had abused its discretion in denying a habeas petitioner's Rule 60(b)(6) motion, given proof that "Buck may have been sentenced to death in part because of his race." *Buck*, 137 S. Ct. at 778. This type of error represented a "disturbing departure from a basic premise of our criminal justice system," which "punishes people for what they do, not who they are," a departure "exacerbated because it concerned race." *Id.* Buck's trial counsel had knowingly presented expert testimony at Buck's penalty phase that Buck was more likely to be a future danger because he was black. *Id.* at 768-69. Trial counsel's ineffectiveness in this regard, however, was not raised on direct appeal or in his initial state postconviction proceedings, and, in federal habeas proceedings, was held to be procedurally defaulted and the merits of the claim were not reached. *Id.* at 770-71.

This Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), recognized a previously unavailable basis to excuse the procedural default of Buck's ineffective assistance claim and he accordingly sought relief under Fed.R.Civ.Proc. 60(b) to reopen his claim that his death sentence was tainted by his trial counsel's ineffectiveness in

presenting racially discriminatory expert testimony. The district court denied relief, concluding that Buck had not shown "extraordinary circumstances" and that he had failed to demonstrate the merits of the underlying claim as the expert's introduction of race was "*de minimis*" because the expert had only linked race and future dangerousness twice. *Id.* at 772. The Fifth Circuit denied a certificate of appealability to address the claim. *Id.* at 773.

This Court disagreed with the rulings from both lower federal courts. With respect to the district court's refusal to reopen the case under Rule 60(b)(6), the Court initially concluded that Buck succeeded on the merits of his claim that trial counsel were ineffective in presenting expert testimony linking Buck's race to his future dangerousness, given the centrality of the future dangerousness finding, the stark impropriety of presenting such testimony, and the likelihood that expert testimony on the subject influenced the sentencing jury. *Buck*, 137 S. Ct. at 776-77. The Court further repudiated the district court's conclusion that the criteria for granting the Rule 60(b)(6) motion was not met because the case did not present "extraordinary circumstances." Rather, the Court observed:

> Buck may have been sentenced to death in part because of his race. As an initial matter, this is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle. As petitioner correctly puts it, "[i]t stretches credulity to characterize Mr. Buck's [ineffective assistance of counsel] claim as run-of-the-mill." Brief for Petitioner 57.
>
> This departure from basic principle was exacerbated because it concerned race.

Id. at 778. That such circumstances were "extraordinary" was "confirmed by what the State itself did in response to [the expert's testimony] in other cases," namely confessing error in five of the six cases the State had identified in which the expert had given such testimony. *Id.* at 778-79. Only Buck's capital sentence had been left untouched. *Id.* Given these circumstances, the

Court found, its recent decisions in *Martinez* and *Trevino* provided the mechanism for having Buck's ineffective-assistance claim finally determined on the merits.

B. Reasonable Jurists Could Debate Whether The District Court Properly Refused To Reopen The Case Because Mr. Tharpe Had Failed To Set Forth Sufficiently "Extraordinary" Circumstances.

Given this Court's strong condemnation of *the possibility* that Mr. Buck had been sentenced to death in part on the basis of his race, Mr. Tharpe clearly demonstrated that jurists of reason could debate the correctness of the district court's conclusion that Mr. Tharpe's juror-bias claim did not present similarly extraordinary circumstances. Although "something more than a 'mere' change in the law is necessary to provide the grounds for Rule 60(b)(6) relief," *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987), *Buck* clearly shows that that "something more" is presented here. First, the new law on which Mr. Tharpe relied not only, like *Buck*, provided a path for considering the merits of Mr. Tharpe's previously defaulted claim, but it also informed the merits review of that claim. More significantly, *Buck* shows that the subject matter of the claim – the likelihood that Mr. Tharpe was "sentenced to death in part because of his race" – is of exceptional importance, representing a "disturbing departure from a basic premise of our criminal justice system" heightened by the "odious" and "pernicious" taint of racial discrimination. *Buck*, 137 S.Ct. at 778. *See also Pena-Rodriguez*, 137 S. Ct. at 868; *cf. Liljeberg*, 486 U.S. at 864 (holding that relief under Rule 60(b) was appropriate to correct district court's failure to recuse itself based on circumstances creating the appearance of impropriety and noting that "it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process").

Together, *Buck* and *Pena-Rodriguez* establish that reasonable jurists could disagree with the district court's decision to deny the Rule 60(b) motion on grounds that Mr. Tharpe's claim was not "extraordinary."[14] The Eleventh Circuit, however, fell into the same error made by the Fifth Circuit in *Buck*, "sidestep[ping] [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits," a practice that "in essence decid[es] an appeal without jurisdiction." *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336-37). Here, the Eleventh Circuit essentially interposed a merits-based rationale for denying COA, accepting the notion that the district court could reasonably have dismissed Mr. Gattie's racist remarks and testimony that he voted to impose the death penalty because Mr. Tharpe was a "nigger" who had killed someone Mr. Gattie considered "'good' black folk," as an "offhand comment" that did not "justify setting aside the no-impeachment bar to allow further judicial inquiry." Appendix A at 5 (quoting *Pena-Rodriquez*,

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[14] Mr. Tharpe also showed that reasonable jurists could debate the district court's conclusion that *Pena-Rodriguez* was a new rule of criminal procedure whose retroactive application was barred by *Teague*. As Mr. Tharpe showed, *Teague* did not apply at all because *Pena-Rodriguez* is a substantive evidentiary rule governing the consideration of evidence after a verdict has been returned and not a criminal procedural rule "designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). Moreover, even if a rule of criminal procedure, it was not "new" because it was dictated by this Court's precedents securing a defendant's right to trial by an impartial jury and protecting against the pernicious effects of racism in the justice system. *See* COA Application at 18-24 (pdf pages 28-34); Reply Brief in Support of COA Application at 9-13 (pdf pages 15-19). *See also Spencer v. Georgia*, 500 U.S. 960 (1991) (Kennedy, J., concurring in denial of certiorari)(observing that the very claim decided in *Pena-Rodriguez* would not be *Teague*-barred if visited in federal habeas corpus proceedings).

The Eleventh Circuit sidestepped this issue, "assum[ing] for purposes of this case that *Pena-Rodriguez* is retroactive and applies in this post-conviction proceeding." Appendix A at 7. The district court's retroactivity ruling is, however, an essential component of its ruling that the Rule 60(b) motion failed to present adequate grounds for the grant of COA. As reasonable jurists may differ on whether *Pena-Rodriguez* applies retroactively, the district court's ruling on this ground presents yet another reason that a COA was appropriate in this case.

137 S. Ct. at 869). *See also id.* at 7 (approving district court's analysis as "appl[ying] the correct legal standard and bas[ing] its decision on findings of fact not clearly erroneous").

Because the Eleventh Circuit misapplied the COA standard by adjudicating the merits and failed to recognize that Mr. Tharpe's claim of juror bias is sufficiently weighty "to deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 773, this Court should grant certiorari, vacate the Eleventh Circuit's judgment, and either take this case up for full consideration or remand with instructions to the Eleventh Circuit to grant a certificate of appealability to address the propriety of relief from judgment.

II. The Eleventh Circuit's Conclusion That Mr. Tharpe Failed to Make a Substantial Showing of the Denial of a Constitutional Right Is In Flagrant Defiance Of This Court's Unwavering Commitment To Eradicating Racial Discrimination in the Justice System.

The Eleventh Circuit concluded that Mr. Tharpe had not "made a substantial showing of the denial of a constitutional right" because he "failed to demonstrate that Barney Gattie's behavior 'had substantial and injurious effect or influence in determining the jury's verdict.'" Appendix A at 7 (quoting *Brecht*, 507 U.S. at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).[15] This statement is astonishing, given the abundant evidence Mr. Tharpe

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[15] The panel's reliance on *Brecht*'s harmless-error standard came out of left field, as no court or party previously mentioned it in addressing Mr. Tharpe's claim. It is certainly questionable whether the *Brecht* standard applies to a claim that a death sentence was impermissibly imposed on the basis of the defendant's race. Such a claim is structural in nature and is of the type that "require[s] reversal because [it] cause[s] fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) (including among this type of claim that of a biased decisionmaker) (citing *Tumey v. Ohio*, 273 U.S. 510, 535 (1927)). Regardless, it is impossible to fathom how Mr. Tharpe's claim that Mr. Gattie voted to sentence him to death because he is a "nigger" would not satisfy the *Brecht* standard. *See, e.g.*, *Buck*, 137 S. Ct. at 778 (describing the prospect that someone was sentenced to death because of his race "a disturbing departure from a basic premise of our criminal justice system" which "was exacerbated because it concerned race"); *Zant v. Stephens*, 462 U.S. 862,

presented in state court that Barney Gattie was an unapologetic racist who stated, in sworn testimony, that he sentenced Mr. Tharpe to death *because* Mr. Tharpe was a "nigger."

Mr. Gattie's language cannot be dismissed as a mere "offhand comment indicating racial bias or hostility." *Pena-Rodriguez*, 137 S. Ct. at 869. To the contrary, Mr. Gattie's statements, which must be taken as accurate assessments of his actual thoughts, given that *no court has ever engaged in any factfinding* on the topic of what Mr. Gattie may have actually said or meant, go to the very heart of the issue of whether Mr. Tharpe was sentenced to death because of his race.

Neither the district court, nor the Eleventh Circuit, considered that Mr. Gattie's free use of the word "nigger" was "by its very nature an expression of prejudice on the part of the maker" which, due to social condemnation, may have been "cloaked" once he was appearing in court.[16] *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986).[17] Yet, ignoring Mr. Gattie's use

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885 (1983) (noting that a defendant's race would be a "constitutionally impermissible or totally irrelevant" factor in the capital sentencing process).

[16] In *Pena-Rodriguez*, this Court noted "The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case . . . . It is quite another to call her a bigot." 137 S. Ct. at 869. That same stigma, of course, could have an equally chilling effect on a juror's willingness to implicate himself as a racist in open court.

[17] In *Heller*, the Eleventh Circuit vacated a conviction where the trial court had engaged in only a superficial inquiry into allegations that several jurors had made anti-Semitic remarks in the jury room. The court rejected the government's efforts to minimize the racial and religious slurs as made "purely in a spirit of jest" having "no bearing on the jury's deliberations. *Heller*, 785 F.2d at 1527. As the Eleventh Circuit forcefully stated:

> *[A]nti-Semitic "humor" is by its very nature an expression of prejudice on the part of the maker.* Indeed, in a society in which anti-Semitism is condemned, those harboring such thoughts often attempt to mask them by cloaking them in a "teasing" garb. A wolf in sheep's clothing is, despite clever disguise, still a wolf. Those who made the anti-Semitic "jokes" at trial and those who reacted to them

of language ignores the historical significance of his words. "Over the years, *nigger* has become the best known of the American language's many racial insults, evolving into the paradigmatic slur." Randall Kennedy, *Nigger: The Strange Career of a Troublesome Word* 22 (Vintage Books ed. 2003). Juror Gattie's free use of the word, particularly coupled with his expressly racist views about integration, intermarriage, and souls, accordingly provided clear evidence of his entrenched racial bias, irrespective of Mr. Gattie's later claim that he used the word "nigger" to describe lazy, no-good white people as well as black people.

"It is beyond question that the use of the word 'nigger' is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination. This word is 'perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry.'" *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001) (ellipsis in original) (quoting Merriam-Webster's Collegiate Dictionary 784 (10th ed. 1993)). As numerous courts have recognized, "using the highly offensive racial slur 'nigger,' . . . constitutes direct evidence of discriminatory intent." *Kinnon v. Arcoub, Gopman & Assoc.*, 490 F.3d 886, 891 (11th Cir. 2007).[18]

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with "gales of laughter" displayed the sort of bigotry that clearly denied the defendant Heller the fair and impartial jury that the Constitution mandates.

Id. (emphasis added). The same holds true here.

[18] *See also, e.g., Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1229-30 (10th Cir. 2015) (citing cases "offer[ing] helpful commentary on the potentially strong polluting power of this [] time-worn word, 'nigger'"); *Umani v. Mich. Dep't of Corr.*, 432 Fed. Appx. 453, 459 (6th Cir. 2011) ("The use of the word 'niggers' is a racial slur 'irrespective of its common usage and without regard for the race of those who use it.'") (quoting *NLRB v. Foundry Div. of Alcon Indus.*, 260 F.3d 631, 635 (6th Cir. 2001)); *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 356 (8th Cir. 1997) ("[U]se of the word [nigger] even in jest could be evidence of racial

A juror's use of the word "nigger" is no less indicative of his or her racial bias. In *Bennett v. Stirling*, the district court granted habeas relief on a juror misconduct claim, finding that a juror's testimony that he "thought Petitioner was guilty 'because he was just a dumb nigger' [was] highly probative evidence establishing that the juror viewed black people as inferior to white people, and that he did not properly consider the evidence presented at trial." *Bennett v. Stirling*, 170 F. Supp. 3d 851, 870-71 (D.S.C. 2016), *aff'd on other grounds*, 842 F.3d 319 (4th Cir. 2016).[19] As the district court observed, "[I]t is difficult to imagine how the Juror could have stated his bias and its impact on Petitioner's sentencing more clearly. Moreover, if this blatant statement of racial hostility does not amount to evidence of constitutionally impermissible racial bias, it is hard to imagine what evidence could meet that standard." *Id.* *See also United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001) (observing with respect to juror misconduct claim that "[w]e have considerable difficulty accepting the government's

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antipathy.") (quoting *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 114 (7th Cir. 1990)); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) ("Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment,' than the use of *an unambiguously racial epithet such as 'nigger'* by a supervisor in the presence of his subordinates.") (internal citation omitted) (emphasis added); *Brown*, 989 F.2d at 861 (finding that supervisor's "use of racial slurs [such as the word 'nigger'] constitutes direct evidence that racial animus was a motivating factor in the contested disciplinary decision," and noting that "[u]nlike certain age-related comments which we have found too vague to constitute evidence of discrimination, the term 'nigger' is a universally recognized opprobrium, stigmatizing African-Americans because of their race"); *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 514-515 (6th Cir. 1991) (supervisor's "use of the word 'niggers' cannot be characterized as harmless or casual. . . [T]he use of the racially derogatory word in juxtaposition with [the supervisor's] statement that he wanted to get rid of two of the three black employees employed at the school, if true, is evidence of racial animus").

[19] On appeal, the Fourth Circuit affirmed the district court's alternate ground for relief – that the prosecutor's racially charged closing argument violated due process. *See Bennett*, 842 F.3d at 325-28. That ruling "makes it unnecessary to consider Bennett's claim that the seating of a racially biased juror violated his right to an impartial jury." *Id.* at 328 n.*.

assumption that, at this time in our history, people who use the word 'nigger' are not racially biased").

Irrespective of Juror Gattie's efforts to backpedal from his initial sworn affidavit, his claim that he was not a racist because he used the word "nigger" to describe both black and white people rings hollow, given the word's well-established history and meaning, and other indications (such as his negative expressions about integration and skepticism that black people have souls) that his view of the world in general and Mr. Tharpe in particular was twisted by racial discrimination.[20] Despite his later assertion that he voted for death based solely on the evidence, his views on race – which he never disavowed – demonstrate that racial animus was inextricably tied to his decision-making in this case.

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[20] In *Bennett*, the district court discredited the juror's self-serving denial of being a racist:

> Federal courts do not "redetermine credibility of witnesses whose demeanor has been observed by the state trial court," *Marshall v. Lonberger*, 459 U.S. 422, 434 . . . (1983), but that does mean that federal courts always must find it reasonable for state courts to credit a witness's testimony to the exclusion of the entire record. The record in this case contradicts the Juror's denial of racial bias so thoroughly that no court could reasonably credit his denial. The Juror's statement that he believed Petitioner to be "just a dumb nigger" cannot be reconciled with his testimony that he did not view black people as inferior to white people. It is unreasonable to find that a juror who states that a black defendant is guilty "because he was just a dumb nigger" in fact had no racial bias regarding that person simply because he later proffers a bald denial of bias. Such denials are properly accorded little weight. *See, e.g., McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 558 . . . (1984) (Brennan, J., concurring in the judgment) (observing that "the bias of a juror will rarely be admitted by the juror himself"); *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) ("It is inconceivable that by merely denying that they would allow their earlier prejudiced comments to influence their verdict deliberations, the jurors could have thus expunged themselves of the pernicious taint of anti-Semitism."); (Dkt. No. 107 at 32:3-16 (Respondents agreeing that people generally do not admit to being racists)).

Bennett, 170 F. Supp. 3d at 871.

The underlying merits of Mr. Tharpe's case are disturbing and set forth a more than colorable claim that his death sentence was the impermissible product of racial bias. This claim deserved encouragement to proceed further and the Eleventh Circuit accordingly should have issued a COA. Mr. Tharpe respectfully submits that this Court should grant certiorari, vacate the Eleventh Circuit's judgment, and either take this case up for full consideration or remand with instructions to the Eleventh Circuit to grant a certificate of appealability to address the Mr. Tharpe's claim that he should be granted relief from judgment.

III. The Eleventh Circuit's Determination That *Pena-Rodriguez* Created A New Claim That Mr. Tharpe Should Have Exhausted In State Court Is Inexplicable And Provides No Basis For The Court To Punt This Issue.

This Court's decision in *Pena-Rodriguez* did not create any new ground for vacating a verdict. Rather, the decision removed an impediment to a court's consideration of evidence showing that a jury verdict (or sentence) was the product of the racial bias of one or more jurors. Mr. Tharpe's claim that his death sentence was the unconstitutional, invalid result of Mr. Gattie's racist beliefs and invidious discrimination was first raised close to twenty years ago and *Pena-Rodriguez* did not transform that claim into something new and different.

Pena-Rodriguez (together with *Buck*) provided firm ground for Mr. Tharpe to seek relief from judgment under Rule 60(b)(6). It undermined the district court's original reliance on the state habeas court's procedural default of the juror bias claim in two distinct and important ways. The state habeas court had ruled inadmissible the entirety of Mr. Tharpe's evidence proving Juror Gattie's bias and its impact on Mr. Tharpe's death sentence, and further ruled that Mr. Tharpe had not shown prejudice sufficient to excuse any default because he "failed to show that any alleged racial bias of Mr. Gattie's *was the basis for sentencing* the Petitioner, as required by the ruling in *McCleskey*." Dkt. No. 19-10 (Appendix F) at 102 (emphasis added). Both of these

rulings were wrong under *Pena-Rodriguez*. First, *Pena-Rodriguez* establishes that the extensive evidence proving Juror Gattie's racist views and their direct impact on his decision to sentence Mr. Tharpe to death should have been admitted into evidence, despite Georgia's evidentiary rule precluding the presentation of juror testimony to impeach a verdict."[21] Second, the case establishes that the state court applied an incorrect and overly burdensome test to show harm from Mr. Gattie's presence on Mr. Tharpe's jury.

In *Pena-Rodriguez*, a non-capital sexual assault case, the defendant had sought to present affidavits obtained shortly after trial from two jurors who described a number of biased statements a third juror had made about Mexicans and the likelihood that the defendant was guilty based on his Mexican background.[22] *Pena-Rodriguez*, 137 S. Ct. at 861-62. The state trial

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[21] The state habeas court relied on the Georgia Supreme Court's decision in *Spencer v. State*, 260 Ga. 630, 643-44 (1990), which refused to create an exception to the no-impeachment rule for evidence of a juror's racial discrimination. *See* Dkt. No. 19-10 (Appendix F) at 99-100. There, the Georgia Supreme Court affirmed the trial court's exclusion of evidence of capital sentencing juror's racial bias, observing that "[t]he rule of juror exclusion . . . is sufficiently race-neutral that further protection is not required, and the evidence in the present case did not reach a level that would justify disregarding the rule. Other than the lone affidavit, Spencer offered no evidence that racial bias materially affected the jury's decision to convict him and to impose a death sentence." *Id.* at 644. *See Spencer*, 500 U.S. at 960-61 (Kennedy, J., concurring) (concurring in the denial of certiorari because of the belief that the issue would not be barred in federal habeas proceedings under *Teague*, and observing that "Spencer, a black man . . . convicted and sentenced to death by a jury made up of six whites and six blacks" had been precluded from presenting a juror affidavit alleging that "other jurors uttered racial slurs concerning petitioner during deliberations" and "that petitioner's race was an important factor in the decision of certain jurors to convict petitioner and sentence him to death"). The case did not reach federal habeas proceedings as Spencer was later found ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). *See Retardation Issue in Capital Cases*, The Augusta Chronicle, Mar. 15, 1999, available at http://chronicle.augusta.com/stories/1999/03/15/met_256216.shtml#.WUFVlmjyu70) (last viewed September 22, 2017).

[22] Specifically, the jurors testified in their affidavits that "Juror H.C." had expressed his belief in the defendant's guilt "because in [the juror's] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women," and other comments indicating the juror's conclusion that the defendant was guilty because he was Mexican and discounting the defendant's alibi because it was

court had ruled the evidence inadmissible under Colorado's evidence rule excluding jurors from impeaching their verdict and a divided state supreme court had affirmed. *Id.* at 862. This Court reversed.

This Court held that, in light of the preeminent importance of eradicating racial discrimination from our justice system, the near-ubiquitous evidentiary rule preventing jurors from impeaching their verdicts could not be applied to exclude probative evidence showing that racial bias affected a verdict. Rather, "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Pena-Rodriguez*, 117 S. Ct. at 869. As this Court explained, "there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubts on the fairness and impartiality of the jury's deliberations and resulting verdict [by] tend[ing] to show that racial animus was a significant motivating factor in the juror's vote to convict." *Id.*

Under *Pena-Rodriguez*, the affidavits and live testimony establishing Barney Gattie's entrenched racist views were admissible to prove that Mr. Tharpe's death sentence was the unreliable and unfair product of invidious discrimination and accordingly invalid under the Fifth, Sixth, Eighth and Fourteenth Amendments. The evidence, showing *inter alia* Juror Gattie's free use of the word "nigger," explaining how he divided African-Americans into "niggers" and "good black folks," and that he knew right away that he would vote to impose the death penalty

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presented by a witness the biased juror incorrectly dismissed as "an illegal." *Pena-Rodriguez*, 137 S. Ct. at 862.

in this case because Mr. Tharpe was a "nigger" while his victim was in the "good-black-folks" category tended to show that "racial animus was a significant motivating factor in the juror's vote to convict." *Pena-Rodriguez*, 137 S. Ct. at 869.

That test, clearly satisfied here, further demonstrates that the state habeas court applied an incorrect and overly burdensome standard in finding that Mr. Tharpe had not shown any prejudice to excuse his purported procedural default because he "failed to show that any alleged racial bias of Mr. Gattie's was *the basis* for sentencing the Petitioner." Dkt. No. 19-10 (Appendix F) at 102 (emphasis added). But *Pena-Rodriguez*'s clarification that the state court's prejudice analysis was wrong hardly establishes that *Pena-Rodriguez* created a "new" claim that, per the Eleventh Circuit, Mr. Tharpe should first have exhausted in state court. That conclusion is mystifying, given that Mr. Tharpe has been raising the same claim – that Juror Gattie's racism invalidates his death sentence – for close to twenty years.[23]

Pena-Rodriguez removed the impediment to consideration of the evidence Mr. Tharpe presented to support this claim. This Court must grant certiorari to ensure that some federal court gives it meaningful consideration on the merits.

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[23] Mr. Tharpe has argued that *Pena-Rodriguez* is not *Teague* barred because (1) it is not a rule of criminal procedure, (2) the evidentiary rule it modified itself is substantive in nature, and (3) regardless, the result was dictated by this Court's precedents securing the right to trial by an impartial jury and combatting the pernicious effects of racism in the justice system. *See* COA Application at 18-24 (pdf pages 28-34); Reply Brief in Support of COA Application at 9-13 (pdf pages 15-19). Should this Court construe *Pena-Rodriguez* to have set forth a new claim, however, it falls to this Court to declare the decision retroactive. *See* 28 U.S.C. § 2244(d)(1)(C). Given the decision's self-described place in this Court's long history of anti-discrimination decisions arising from the Court's "duty to confront racial animus in the criminal justice system," *Pena-Rodriguez*, 137 S. Ct. at 867-68, Mr. Tharpe respectfully submits this Court should declare the case fully retroactive.

CONCLUSION

"The jury is to be 'a criminal defendant's fundamental "protection of life and liberty against race or color prejudice."'" *Pena-Rodriguez*, 137 S. Ct. at 868 (quoting *McCleskey*, 481 U.S. at 310 (internal citation omitted). This Court must grant the Petition for Writ of Certiorari in order to ensure that the fundamental protection the jury is intended to confer is not grotesquely perverted by allowing the State to proceed with Mr. Tharpe's execution without ever having afforded him merits review of his disturbing claim, supported by credible evidence, that he was sentenced to death because in one juror's eyes he is a "nigger" who should be executed because of his race.

This 23rd day of September, 2017.

Respectfully submitted,

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COUNSEL FOR PETITIONER

No. 17-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

KEITH THARPE,

Petitioner,

-v-

ERIC SELLERS, Warden
Georgia Diagnostic Prison,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by electronic mail on counsel for Respondent as follows:

Sabrina Graham
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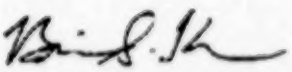
This 23rd day of September, 2017.



Attorney